No. 4038.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error

vs.

J. M. Rosborough,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error is correct in stating (Opening Brief of Plaintiff in Error, p. 1]:

"This is an action in deceit, instituted by defendant in error, Rosborough, against Elizabeth Houston, as sole beneficiary under the will of Otho S. Houston, deceased, and also against Elizabeth Houston as executrix of the estate of said Otho S. Houston, deceased, to recover damages for an alleged fraud arising out of misrepresentations made by Otho S. Houston in his

lifetime, and thereby inducing Rosborough to trade certain real estate in Los Angeles for a trust deed secured by certain property in Texas belonging to Houston."

It should be noted, however, that while the complaint [Tr. of Rec., p. 7] is entitled as against plaintiff in error both individually and as executrix, it does not pray [Tr. of Rec., p. 24] judgment against defendant in any particular capacity, and the findings [paragraph VIII thereof, Tr. of Rec., p. 59] and the judgment entered thereon [Tr. of Rec., p. 61] are against plaintiff in error as executrix and not individually (except as to costs) the judgment reading [Tr. of Rec., p. 61], "that said claim set forth in the complaint be and the same is hereby allowed as a claim *against said estate and that the same be paid in due course of administration by defendant.*" (Our italics.)

Plaintiff in error is, therefore, not affected by the judgment for damages except insofar as it reaches assets coming to her hands as executrix of the estate. As to costs, while liable individually (as we shall see in its proper place in our discussion to follow) she is entitled to reimbursement against the estate.

The Issues Defined and Classified.

As there is no evidence nor bill of exceptions contained in the transcript of record on this appeal, it is clear (as we shall show in our argument to follow) that *no question of fact* is presented for decision on

this appeal. In other words, the facts as recited in the opinion and findings of the trial court not being questioned, nor capable under the state of the record of being controverted *must be accepted by this court as true.*

At the threshold we are met by an issue which, in human interest involved in the struggle of man-made law to square with natural justice or of the artificial to match with the devine, compares with the four technical points comprising the entire argument of plaintiff in error as the snowy peak of Shasta unto four ant hills on the outskirts of the village of Hog Hollow. That issue, large enough to fill every court room in the land, is this: Shall "grievous fraud" coupled with an undoubted "fraudulent intent and purpose" [Trial Court's Opinion, Tr. of Rec., p. 68] "demonstrated in the clearest fashion" innocently relied upon, and which resulted in great financial damage to the party so relying and to corresponding great profit to the guilty perpetrator and his estate, as found by the trial court, all of which facts *are not and cannot be controverted on this appeal* be allowed to prevail, and the fruits of such admitted fraud be retained as enrichment of the estate of the wrongdoer?

Of the thirty-five pages of the opening brief of plaintiff in error over seven pages are devoted to a statement of the case and quotation of the assignments of error. Of the only twenty-eight pages of argument, twenty-one are devoted to the question of whether or not the cause of action survives. The remaining seven pages of argument are divided among the other three

points comprising all of the contentions of plaintiff in error on this appeal. This division of the opening brief of plaintiff in error will be sufficient present support for our assertion that the only point urged with any seeming seriousness on this appeal is the mere question of law as to whether or not the cause of action survives, and we are sure that the court will find a determination of such question will practically dispose of this appeal.

ARGUMENT.

No Question of Fact Is or Should Be Considered on This Appeal for the Reason That No Exceptions nor Bill of Exceptions Are Contained in the Transcript of Record on Appeal.

This is so elementary that it is perhaps superfluous to argue. (Foster's Federal Practice (6th Ed.), Secs. 453, 479, and authorities there cited; Montgomery's Manual of Federal Procedure (2nd Ed.) sections 596 and 597, citing R. S. U. S., Secs. 700 and 953.) Plaintiff in error's fourth contention (Opening Brief of Plaintiff in Error, page 5,) seems to suggest or imply in its statement a question of fact as to whether or not the judgment was excessive. Of course, any such fact could not be determined without reviewing evidence on the bill of exceptions.

The Trial Court Was Correct in Its Rulings on Demurrer and on the Trial That the Cause of Action Survives.

As we have pointed out above, three-fourths of the argument of plaintiff in error in opening brief is devoted to the matter of survivorship. The point was raised by demurrer when the complaint was filed. It was at that time carefully considered by the trial court who overruled the demurrer and found that the cause of action *did* survive. It was again even more carefully considered on the trial, as the opinion of Judge Bledsoe shows. In its opinion, the trial court [Tr. of Rec., p. 69], says:

> "The point is urged again that the action may not be maintained against the executrix of Houston. I find nothing in the statutes of California denying the right of a plaintiff in such a case to proceed against the executrix. The property actually obtained by the fraud of the deceased or its fruits having come into the hands of the executrix now serves to enrich the estate in her hands. Right and justice would seem to demand that such an unlawful enrichment should not be permitted and that the value of the thing wrongfully acquired and wrongfully retained should be recoverable. No statutory inhibition existing, I am persuaded that the rule of the common law is to be followed. From a careful reading of the case of Hambly v. Trott, 1 Cowp. 371, which is very illuminating in its reasoning, I understand the rule to be at common law, that the party defrauded may seek relief as for the value of the thing ob-

tained even as against the executor. Here, as the result of the fraud, the estate of the deceased has been enriched and the effort merely is to obtain that which has thus been wrongfully secured and retained. See also to the same effect, 1 C. J. 174."

After a careful review of every angle of the question as presented in the opening brief of plaintiff in error it is believed that we cannot improve upon the argument on this question made in our brief filed in the trial court, which reads as follows:

DOES THE CAUSE OF ACTION SURVIVE?

"This question has already been twice decided in the affirmative by this court. First, it was the principal question raised upon the demurrer to the complaint when, after a lengthy argument and careful consideration, the demurrer was overruled. Again it was fully presented and reconsidered at the opening of the trial of this case, when it was again similarly decided. Notwithstanding that the question had thus been doubly passed upon by this court, counsel on final argument claimed the indulgence of the court for a third consideration, and now again presents a lengthy discussion of the subject in 'Defendant's Opening Brief.'

Except in the interest of economy of the court's time, we have not the slightest objection to any amount of reconsideration of the subject, as we are confident that the more thorough the re-examination of the grounds for the decision, the more firm will be the conviction that the court's decision on demurrer was sound, and that it cannot be successfully assailed.

Considerably more than half of the seven pages of counsel's discussion of this question is devoted to the citations and consideration of authorities applying the common law rule that there is no survivorship apart from the statute against the estate of a decedent guilty of fraud.

There seems to be no doubt that this was the *general rule* at common law, and we do not question counsel's discussion of the authorities applying this general rule. It is, however, subject to important exceptions which counsel apparently has overlooked. One of these exceptions is mentioned in the case of Fox v. Hale and Norcross, S. M. Co., 108 Cal. 478, which was, like the case at bar, an action against an executor for fraud of his decedent and relating—not to personal property—but [like the case at bar] to real property in which the court at page 483 quotes Lord Mansfield to the effect that 'where the property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.' This decision has never been reversed, nor have the grounds upon which it was based ever been questioned, so far as we can learn: it is precisely in point and as a further consideration will show is decisive of the question now before the court. The *general rule* of the common law urged by counsel, minus the exception, IS NOT the law of California.

The principal fallacy of counsel's argument consists in the assumption that the general rule was without exceptions, except as created by statute; and in over-

looking the *most pertinent decisions recognizing such exceptions and construing the statutes.*

One of the most important decisions to be considered in this connection is the case of Fox v. Hale and Norcross S. M. Co., mentioned *supra* (two opinions in the same case, the first at 108 Cal. 369 and the second at 108 Cal. 478).

Let us first, however, summarize counsel's argument and then measure it by the law of this Fox case. Counsel's whole argument may be reduced to this:

> 'The common law (overlooking the exception) that the cause of action did not survive is in force in this state, except insofar as modified by statute. The only modification of said common law is section 1584 of the C. C. P., which reads:
>
> ' "1584. Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person." '

Counsel's argument then proceeds:

> 'The fraud complained of in the case at bar does not come within the language of the statute in that Houston neither (1) wasted; (2) destroyed; (3) took; (4) carried away; (5) converted to his own use goods or chattels of plaintiff, or (6) committed any trespass on the real estate of plaintiff.'

Now let us consider the nature of the frauds which sustained the judgment in the Fox case. They consisted in various things not coming literally within the statute. Note particularly that the code section under consideration (C. C. P. 1584) refers entirely to *personal property* except in the case of trespass to real estate. There is, of course, no question of trespass in the case at bar, and counsel's argument resolves itself into this: It is not claimed that Houston by any fraud and deceit deprived Rosborough of *personal property;* Rosborough is complaining of being deprived by the fraud and deceit of Houston of *real property.*

Now to answer this argument: The fraud in the Fox case consisted, among a number of other things, of (1) mining, transporting, and milling low grade or worthless ores, misappropriating said ores; (2) insufficiently milling the high grade ores and leaving a large amount of gold and silver in the tailings, afterwards working them over and appropriating the same. Counsel has no doubt assumed that these minerals and ores being mined under this fraudulent system were *personal property* and that therefore the judgment could be sustained under section 1584 of the Civil Code. This assumption, however, overlooks the language of the Political Code, section 3617, in which it is enacted that the term 'real estate' includes: 'all mines, *minerals*, quarries, in and under the land.' When, therefore, defendants in the Fox case mined and transported, or wasted or carried away ores or

minerals, they were appropriating, wasting, and carrying away—not personal property—but real property. (They were not committing any trespass to real property, because in lawful possession of the same and performing ostensibly the duties of their employment.) [The action was not to recover any specific real property but damages for fraud.] Literally, section 1584 of the C. C. P. therefore does not and cannot sustain the judgment in the Fox case. But remember that the law of California consists not only of the code sections under consideration, but of the *decisions of the court of California construing them.* For the sake of argument let us grant that the interpretation of the California court in this Fox case is forced—let us say, even, that it is an example of judicial legislation where the mighty arm of the court forges the work of the Legislature to square with justice and to avoid injustice—nevertheless *it is the law of California* and should be followed by this court. However, this decision rests firmly *on the exception to the common law rule which the court recognizes* [whether consistently or otherwise, and whether such assumed exception was *dicta* or not] as stated by Lord Bansfield in Hambly v. Trott, Cowp. 371: 'Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.'

In this Fox v. Hale and Norcross case, defendant had by fraudulent conspiracy and deceit involving numerous and complicated methods, deprived plaintiff

of what the law defined as real estate, which is exactly what is complained of in the case at bar, and it was sought not to recover any specific ore but *damages*. The court held that under the law of California the action survived against the executor. We submit that the rule is clearly applicable to the case at bar.

It is believed that counsel has underestimated the value of the decision of our own Court of Appeals (opinion by Judge Morrow) in Henderson v. Henshall, 54 Fed. 320, the third paragraph of the syllabus of which is as follows:

> 'Survival of Actions—Actions for Deceit.
>
> 'Under Civil Code, Cal. Sec. 953, 954, defining a thing in action, and providing that, when arising out of a right of property, on the death of the owner it passes to his personal representatives, a cause of action for damages by reason of false representations as to the value of land, whereby one is induced to part with his land in exchange, will survive.'

The sections of the code referred to in this decision are as follows:

> '953. A thing in action is a right to recover money or other personal property by a judicial proceeding.'
>
> '954. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passess to his devisees or successor in office.'

The peculiar force and applicability of the decision in the Henderson case arises from the fact that (1) *one of the important tests of survivorship is assignability;* (2) the reasoning of the court shows the liberality with which the old common law technicalities are disregarded.

In connection with our analysis and consideration of this Henderson case, let us first call the court's attention to the case of Graves v. Spier, 58 Barbour (N. Y.), 349, where it was held (5th paragraph syllabus):

> 'A cause of action for fraud in the purchase and sale of real estate survives to and against the personal representatives of a deceased party and the transaction is therefore assignable, so that the assignee may maintain an action upon it.'

As showing the inseparability of assignability and survivorship, the court at page 386 says:

> 'It is quite difficult to see why a cause of action growing out of a fraud, practiced by one upon another in the exchange or sale of property, by which the defrauded party loses his property, and which is a species of tort, is not also assignable. All cases agree that it is assignable if the cause of action survives, and may be maintained by or against the personal representatives of the parties to the transaction. We have seen that a cause of action like the one before us does survive. * * * I conclude, therefore, that the action is maintainable by the plaintiff as assignee.'

Now referring again to this Henderson v. Henshall case, *supra,* the court holds in effect broadly that an action for the recovery of damages on a land trade comes within section 954 of the Civil Code as 'a thing in action arising out of the violation of a right of property or out of an obligation * * *.' This being so it is assignable and being a thing in action capable of assignment it necessarily survives.

Note particularly the reasoning of Judge Morrow in the case under consideration (Henderson v. Henshall, at page 331):

> 'It is urged that these provisions do not in express terms distinguish those things in action that survive from those that abate upon the death of the owner. There may be some question as to the survival of a thing in action arising out of a personal injury, but the thing in action in this case arises out of the violation of a right of property, which, by the express language of section 954 of the Civil Code, passes to the personal representatives of the deceased. Moreover, section 4 of the Civil Code provides the following rule of construction for its provisions:
>
> ' "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."
>
> 'If we follow this rule, and construe the provisions of the code liberally, with a view to effect

> its objects and to promote justice, we must determine that the cause of action in this case survived to the administrator as assets on his hands, because the wrong which is the subject of the action was not merely a personal injury inflicted upon the decedent, and the damages claimed the measure of her bodily or mental suffering, but the wrong was to the estate of the original plaintiff, whereby it became diminished in value. "It is now the general American doctrine that all causes of action arising from torts to property, real or personal,—injuries to the estate by which its value diminished,—do survive and go to the executor or administrator as assets in his hands." Pom. Rem. & Rem. Rights, Sec. 147. We think, upon principle as well as authority, the cause of action in this case survived to the administrator. Judgment affirmed.'

This reasoning, we submit, applies with equal force to the circumstances in the case at bar.

An illustration of liberal construction of a statute supposed to be in derogation of the common law, but really not so because of the exception noted by the court in Fox v. Hale Case, *supra*, is contained in the decision of the court in Thornton and Thomas Co. v. Bretherton, *et al.*, 32 Montana 80. A sufficient statement of the facts of this case is contained in the first paragraph of the opinion which is as follows:

> 'This action was commenced to recover damages in the sum of $22,050 for the wrongful acts of defendants Bretherton and one John D. Thomas, in his lifetime, in procuring in a certain suit in

the District Court of the county of Silver Bow, the appointment of a receiver of the business and property of Thornton and Thomas Mercantile Company (hereinafter referred to as 'Company'), and causing loss of its accounts and merchandise.'

The court says:

'It is the contention of appellants that the right of action, so far as it relates to Mattie A. Thomas, as executrix, abated with the death of John D. Thomas, and that the maxim of the common law, 'a personal right of action dies with the person,' has not been modified by statute. Section 2733 of the Code of Civil Procedure is as follows: 'Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use the goods or chattels of any such person, or committed any trespass on the real estate of such person.' The courts have not been uniform in the interpretation of laws of this nature, but we have arrived at a satisfactory conclusion. The section, *supra,* was enacted in 1895, and is the same as section 1584 of the Code of Civil Procedure of California.'

After an analysis and consideration of the decisions of Coleman v. Woodworth, 28 Cal. 568; Fox v. Hale & Norcross, *supra,* and noting that the Supreme Court of Utah has followed these authorities in Warren v. Robinson, 21 Utah, 445, the court concludes:

'We accept this construction of our statute which has so long prevailed in California, and affirm the

ruling of the court below that this action can be maintained against Mattie A. Thomas, as executrix of John D. Thomas.'

Let it be noticed particularly in considering this Montana case that while the wrongful act complained of caused damage and loss to the plaintiff, it did not come within the literal wording of the statute, in that the wrongdoer did not waste, destroy, take, or carry away, or convert to his own use any goods and chattels of plaintiff. This clearly shows a tendency to liberality rather than strictness and indicates that the common law has other exceptions than those contained in the code provision.

In Warren v. Robinson, 21 Utah 429, it was shown that the deceased 'had been negligent and inattentive to duty, and that in consequence thereof, loss resulted.' Utah had a statute similar to our own and the court decided: 'In such a case the action survives and may be maintained against the executrix.' Citing Fox v. Hale & Norcross S. M. Co., 108 Cal. 475; and Coleman v. Woodworth, 28 Cal. 567 as authorities for its decision.

Surely it is clear from the foregoing authorities that liberality rather than strictness should govern in the interpretation of this law; but, we submit, even with the most strict interpretation the action survives, for the exception stated by Lord Mansfield rather than the general rule of common law applies."

In 1 Corpus Juris, page 185, Sec. 340, it is said:

> "Where, however, the estate of the injured person was diminished by the wrong, his personal representatives might, in some cases, even at common law, recover for the injury; and where the estate of the wrongdoer was benefited, his personal representatives were liable. But in order that a right of action arising out of a tort should survive against the executor or administrator of the tort feasor it was generally held essential that the latter should, by the wrongful act, have acquired specific property by which, or by the proceeds of which, the assets in the hands of his personal representative were increased. It was not enough that the benefit resulted or that expense was saved to the tort feasor, by which his estate was larger than it otherwise would have been. But where there was a duty as well as a wrong an action survived against the executor."

Kerr on Fraud and Mistake (5th Ed., 1920) states the law as follows:

> "In all cases of fraud the hand of the court is not arrested by the death of the wrongdoer. An action survives against the executor when the wrong complained of has benefited the estate of the deceased." (Citing the following cases: Rawlins v. Wickham, 3 D. & J. 304, 28 L. J. Ch. 188; Bresley v. Mousley 4 D. & J. 78, 28 L. J. Ch. 620, 124 R. R. 164; Walsham v. Stanton, 1 D. J. & S. 690, 137 R. R. 342; New Sombrero Phosphate Co. v. Erlanger, 5 C. D. 74, 46 L. J. Ch. 425.)

As in the argument before the trial court, plaintiff in error in the opening brief has devoted much time in

attempting to establish the general rule at common law (which never was controverted by us) that actions *ex delicto* did not survive, but principally the attempt has been to minimize or ignore the exceptions clearly indicated by the immediately foregoing authorities. A careful study of the cases from which counsel's excerpts were taken will show clearly why the exceptions we are contending for did not apply in those cases.

A circumstance, the importance of which cannot be over-estimated, but concerning which plaintiff in error in the opening brief has not seen fit to comment, is that (as appears in our above quoted argument in the trial court) *both of the states of Utah and Montana have statutes similar to 1584 C. C. P. of California and the Supreme Courts of both of those states (Warren v. Robinson,* 21 Utah 428, *at near the bottom of page 445 and Thornton v. Bretherton,* 32 Montana 80) *have cited, applied, and followed the interpretation of that code section as found in Fox v. Hale & Norcross,* 108 Cal. 478, *holding that an action for fraud against an executor may be maintained—in other words that the exception of the common law upon which we insist prevails. Notwithstanding any possible superficial plausibility of counsel's reasoning, the stubborn fact is that the highest courts of three states having similar statutes have concurred in holding that neither the general rule of the common law nor the code provision under consideration is applicable but that an action of the character of that at bar does survive against the executor.*

At pages 28 and 29 of the opening brief of plaintiff in error we find a discussion of this case of Fox v. Hale & Norcross Silver Mining Company, 108 Cal. at page 478, the evident intent of which is to make it appear that such case is not in point. For instance, on page 29 of said brief we find counsel stating that the holding as to survivorship was unnecessary to the decision in the case because the court held that a *nunc pro tunc* judgment was properly entered as of the date of the decision, at which time the defendant was alive. This statement is entirely erroneous, and indicates that counsel may have only read the syllabus of the case and did not study the text. The fact is (read near bottom of page 483 of 108 Cal.) that while the Supreme Court found that the trial court had power to enter a *nun pro tunc* judgment it also found that such order was not proper under the circumstances of that case and *set such judgment aside* directing a judgment to be entered *payable in due course of administration,* i. e., in effect against the executrix. Such decision made necessary a finding on the question of whether or not plaintiff could maintain the action against the executrix and the court's opinion (near the bottom of page 483) on that point reads as follows:

> "The right of the plaintiff to maintain the action against the executrix of Hobart is fully authorized by section 1584 of the Code of Civil Procedure. (See also, Coleman v. Woodworth, 28 Cal. 567.) It falls within the rule given by Mansfield in Hambly v. Trott Cowp. 371: 'Where

property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.' "

We submit, therefore, that the decision in this Fox case is strictly in point; that it correctly sets forth the law of California; and that the law is that a cause of action like that at bar survives against the executor, and that this court should follow said decision.

There Is No Reason Whatever for Assuming That the Action Is Based on Contract, and There Is No Requirement in the Law That Any Claim Should Be Filed Against the Estate of Otho S. Houston Prior to the Institution of the Action.

The second contention of the opening brief of plaintiff in error is first mentioned at page 5 of said opening brief. Beginning near the bottom of page 29 thereof a little over three pages are devoted to the consideration of this second contention.

Now, we urge that this so-called second contention is purely and simply "a man of straw." It does not represent any actual contention, even plausibly in the case. The opening brief of plaintiff in error begins with the statemet, "This is an action in deceit * * *." At page 8 of said opening brief of plaintiff in error, it is again asserted, "This is an action as stated in the complaint 'for deceit' * * * it is our contention (1) that this is an action brought to recover damages for tort committed."

Now, it is also the contention of defendant in error that this is an action in deceit and is brought to recover damages for tort committed. It seems, therefore, *that both parties are contending the same thing;* and as proof that both are right in so contending it is only necessary to scan the complaint. Why then "assume that the action is based on contract" as suggested in counsel's second contention? The answer is *that both parties agree that it is not based on contract* and there is no warrant, consequently, for assuming otherwise. It is quite apparent, therefore, that the law quoted and cited by counsel under this head is not applicable. The law of California does not require a claim based upon tort to be presented to the executrix.

In Leverone v. Weakley, 155 Cal. 395, the court, near the bottom of page 401, said:

> "The claim for damages, not being one arising on a contract, was not required to be presented to the executrix prior to the bringing of suit." (Citing Hardin v. Sinclaire, 115 Cal. 460, 463.)

In Hardin v. Sinclaire, 115 Cal. 460, the second paragraph of the syllabus is as follows:

> "Only claims arising upon contract with a deceased person are required to be presented as claims against his estate, before an action can be brought thereon against his administrator, and a presentation is not required of a claim for damages for wrongful acts before the bringing of an action to recover the same against the administrator."

Near the bottom of page 463 of the authority last referred to, the court said:

> "The statute in regard to claims against estates provided that 'all claims arising upon contracts' must be properly presented and rejected before suit can be brought to recover them. (Code Civ. Proc., Secs. 1493, 1498.) This is not such a case, but an action to recover damages for wrongful acts. No presentation was therefore necessary."

Under Express Code Provisions Judgment Against the Executrix Officially for Damages Caused by the Deceit of the Testator Carries With It the Right to Judgment Against the Executrix Individually for Costs, and the Executrix Individually Has Her Recourse Against the Estate for Reimbursement.

Taking up the third mentioned contention (Opening Brief of Plaintiff in Error, p. 5), argument concerning which is found under III at page 33 of the opening brief of the plaintiff in error: Counsel has devoted but a scant page to the contention that no judgment is warranted against the executrix individually.

As we have heretofore pointed out the judgment for damages for the fraud [Tr. of Rec. p. 61] amounting to $10,060 *is not* against the defendant individually but only against her in her official capacity as executrix; and thus such judgment only reaches defendant insofar as assets came to her hands as such executrix.

Judgment for costs, however, is against her individually.

Section 1022, C. C. P., provides that costs are allowed, of course, to the plaintiff upon a judgment in his favor (among other cases) in the following:

> "3. In an action for the recovery of money or damages when plaintiff recovers $300.00 or over."

Of course, we need no argument to support allowance of costs to defendant in error, and perhaps we can consider that the question as to *allowance of costs* is not raised on this appeal. We only refer to this section in connection with section 1509, C. C. P. which reads as follows:

> "LIABILITY OF EXECUTOR, ETC., FOR COSTS. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause."

(See:

Stevens v. San Francisco & N. P. R. R. Co., 103 Cal. 252, 253;

Meyer O'Rourke, 150 Cal. 179;

St. Marys Hospital v. Perry, 152 Cal. 338

as to validity and interpretation of this section of the code.)

There is no bill of exceptions nor record of any kind containing any objection or exception or showing in any manner that the defedant individually or officially or in any manner whatsoever objected to the judgment or taxation of costs against her in the trial court.

In the case of Meyer v. O'Rourke, 150 Cal. 179, it was held that the estate is not an aggrieved party on an appeal by an executor as such from an award of costs against him; nor is he an aggrieved party, unless he has connected himself with the proceeding in the lower court by a motion for relief from the costs, so as to entitle him to have the constitutionality of the above section considered.

In this action it should be noted that the local rules (41-42) of the District Court for the Southern District of California provides for objections to the taxation of costs and an appeal from the decision of the clerk to the judge of the court. No such procedure nor any other similar procedure such as suggested in Meyer v. O'Rourke, *supra,* was followed. As before stated, there is no record of any objection or exception whatsoever. There is no record of any motion for a new trial—although it is clear that under the section of the code above quoted the judgment should be against the defendant individually. It is therefore submitted that there is no record permitting consideration of the third contention of plaintiff in error on this appeal, and even if there was, the judgment for costs against defendant individually is authorized and required by the terms of the code section quoted.

There Is No Evidence in the Record—No Bill of Exceptions—Which Authorizes Any Inquiry in the Merits of the Fourth Contention of the Opening Brief of Plaintiff in Error, Namely, Whether or Not the Judgment Is Excessive.

The action was to recover damages for fraud, not, as assumed by counsel in the contention under consideration, to recover merely a difference in value between property traded. The rent or the rental value of the property was one of the elements of value that defendant in error was deprived of as a result of the fraudulent devices practiced upon him by plaintiff in error's testator and was, we contend, one of the elements making up the amount of damages found by the court. The propriety of considering the rental value as an element cannot be determined without evidence upon which the finding was based. Presumably the judgment covered all items of damage to defendant in error, and the rental value was one of them.

This contention is first mentioned on page 5 of the opening brief of plaintiff in error and the little over a page of argument concerning it is found at page 34 of said opening brief.

We find ourselves in agreement with counsel in the general statement of law at page 35 of the opening brief of plaintiff in error to the effect that the measure of the recovery of damages for fraud arising out of an exchange of property is the difference in reasonable value of what the defrauded party parted with

and the reasonable value of what he received. But, as just above pointed out, there is no bill of exceptions before this court which would permit inquiry into the question of whether or not the trial court correctly applied the law. The facts to which application of the law was made must first be known, and there is no evidence in the record. Presumably, and the fact is, (if we could be permitted to so state) that what the injured party in the case at bar parted with was not only the property itself, but the income therefrom for a number of years. That is to say, but for the fraud he would have held the difference in value between the property exchanged and he would further have received the rent money accruing therefrom, all of which he was deprived by reason of fraud. We submit that in the absence of a bill of exceptions the finding must be presumed correct, and that there is nothing in the record to warrant this court in finding that the rental value was not a proper element to be considered in assessing damages.

No Other Errors in the Record.

We have now considered each of the four contentions which counsel state (Opening Brief of Plaintiff in Error, p. 4) are relied upon by plaintiff in error on this appeal. The assignments of error also said to be relied upon, quoted by counsel at page 5, *et seq.*, opening brief of plaintiff in error, are possibly broader in minute respects than counsel's four contentions. For instance, in the first specification quoted

at the bottom of page 5 of the opening brief, error is assigned generally in overruling the demurrer. This demurrer sets forth other grounds than those apparently relied upon in counsel's brief. Several of these grounds for demurrer are directed to the question of joinder of defendants individually as well as officially. We have heretofore adverted to the fact that no individual judgment was prayed against defendant and to the further circumstance that the judgment sought to be reversed is against her officially, except for costs, and as to costs the judgment is expressly authorized by the code provision.

That there is no error in the record and that the judgment should be affirmed in every respect is

Respectfully submitted,

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